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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1647

MOBIL OIL CORPORATION, Petitioner,

versus

DANIEL DEVERS, Appellee.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent, Daniel Devers, respectfully prays that the Petition for Writ of Certiorari be dismissed.

Respondent does not contest the *Opinion Statement*, *Jurisdiction Statement*, or *Question Statement*, as presented in the Petition.

STATEMENT OF THE CASE

Respondent does contest the accuracy and completeness of the Statement of the case as presented in the Petition.

The gas buggy was owned by Mobil and the jack which was an integral part of the gas buggy was broken. Thus

Devers had to bodily lift the A-frame. Mobil refused to replace the jack though it was their contractual duty to do so, and though they were more than once requested to do so. The weight of the gas buggy varied from time to time relative to the amount of gasoline inside without Devers necessarily knowing the weight on each occasion of lifting, until the lift was actually, bodily made, and the weight even varied throughout a single lift depending on the amount of shifting of the gasoline within the buggy. Devers did not realize he would hurt his back by lifting the tongue of the gas buggy. A fellow worker lifted the tongue and did not get hurt. Dever's injury may even have occurred gradually over a period of time.

REASONS FOR DENYING THE WRIT

This case is not a case of peculiar gravity or general importance and it does not involve uniformity of decisions. It does not involve an important State question decided in a way in conflict with applicable State Law.

Plain and simple, this case involves fact issues determined by the District Court and affirmed by the Appellate Court. It has been Petitioners' contention throughout, that the *FACTS* were so strong in its favor that the District Court and the Appellate Court should have decided as a matter of law, that the complained of danger was open and obvious. Both the District Court and the Appellate Court rejected Petitioners' interpretation of the *FACTS* and Petitioners' interpretation of the Texas Case Law.

The fact situation in this particular case is peculiar and unlikely to re-occur. The opinion of the Court of Appeals

applied the Texas law correctly to the facts and decided the mixed law and fact question of "open and obvious" in favor of the Respondent.

Mere novel questions, in the absence of general importance will not suffice to grant a Writ. *The Ansaldo San Giorgio I. v. Rheinstrom Bros. Co.*, 294 US 494.

Certiorari should not be granted to review evidence or discuss specific facts. *General Talking Picture Corporation v. Western Electric Company*, 304 US 175.

The Supreme Court will not ordinarily decide questions of State law independently but will look to the Trial Court for aid in dealing with issues of State Law. The Supreme Court is hesitant to overrule the decisions by Federal Courts skilled in the law of particular states. *Skelly Oil v. Phillips Petroleum Co.*, 339 US 667. The Supreme Court usually accepts, and will not disturb, the determination of the Courts of Appeals of such questions in the absence of plain error. *Appalachain Power Co. v. American Institute of Certified Public Accountants*, (Supra).

The Supreme Court will not ordinarily intervene or disturb the decision of the Court of Appeals with respect to factual determinations. *Peurifoy v. C.I.R.*, 358 US 59.

Under "Two-Court Rule" a court of law such as the United States Supreme Court rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two Courts below in absence of very obvious and exceptional showing of error. *Great Atlantic and Pacific Tea Company v. Supermarket Equipment Corporation*, 340 US 147.

Where the District Court and Circuit Court of Appeals agree on a question of negligence, the Supreme Court will not make a minute analysis of the evidence. *Boehmer v. Pennsylvania Railroad Co.* 252 US 496.

In its Brief in the Court of Appeals and in its argument in the District Court, Petitioner relied upon the "slip and fall" cases in Texas in trying to establish the defense of open and obvious. The Court of Appeals correctly distinguished the slip and fall cases from this case stating that in the Devers case, the 1. condition and the 2. danger were separable, and finding that Devers, though appreciating the 1. condition, did *not* fully realize and appreciate the nature and extent of the 2. danger. Devers so testified.

The distinction being that in "slip and fall" cases, the 1. condition and 2. danger are inseparable.

Likewise the "number of exposures: theory as propounded by Petitioners is limited to fall down cases or cases in that particular class of obvious *danger* as distinguished from cases of obvious *condition.*

The only case cited by either party, in Brief before the Court of Appeals, having a fact situation similar to the Devers case is *Ellis v. Moore,* 401 S.W. 2nd 789. The *Ellis* case was decided by the Texas Supreme Court. Like Devers it was a case of repeated use by the victim, of defective equipment, finally resulting in injury. Like Devers it was a case where the victim admitted he was aware of the condition but not of the danger. It was a case where the Texas Court of Civil Appeals entered judgment, nevertheless for the Defendant on the basis that the danger was open and obvious as a matter of law.

It was a case in which the Texas Supreme Court reversed the Court of Appeals, holding that whether or not *Ellis* appreciated the extent of the danger was a *FACT* question property decided by the Jury in his favor. It was the case closest factually to Devers. There, the Texas Supreme Court said:

> "Generally speaking, cases should be determined on the basis of negligence and contributory negligence. Our disposition is not to extend the doctrine of assumed risk so as to excuse negligent conduct on the part of the defendant. As above indicated, it is a harsh doctrine, and we are not disposed to relax the rules set down for the escape from liability under it."

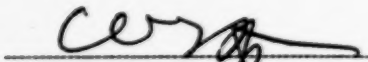
"Open and obvious" is becoming decreasingly important as a defense and Respondent could cite other recent decisions and treatises indicating a definite trend of the Texas Courts away from deciding negligence issues as a matter of law even in extreme cases. These cases and treatises were cited in Respondent's Brief before the Court of Appeals.

The Court of Appeals decision correctly follows the Texas case law. Texas Courts would have decided this case exactly in the same manner. This is an unusual fact situation falling well outside the "open and obvious". Petitioner states that the Devers decision by the Fifth Circuit will result in the demise of "open and obvious" in Texas. Unfortunately this is not so. "Open and obvious" is alive and well in Texas, but is perhaps now closer to being in its proper perspective.

CONCLUSION AND PRAYER

Respondent respectfully requests that the Writ of Certiorari be denied.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply to Petition for Writ of Certiorari has been forwarded to Cleve Bachman, Attorney at Law, Beaumont Savings Building, Beaumont, Texas, Attorney for Petitioner and James W. Mehaffy, Attorney at Law, San Jacinto Building, Beaumont, Texas, Attorney for Intervenor by depositing the same in the United States Mail, properly addressed and with postage paid on this the 16 day of May, A.D., 1974.

Woodson E. Dryden